

AMENDED IN ASSEMBLY APRIL 12, 2011

AMENDED IN ASSEMBLY MARCH 8, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 640

Introduced by Assembly Member Logue

February 16, 2011

An act to amend Section 13385 of the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

AB 640, as amended, Logue. Water discharges: mandatory minimum civil penalties.

Under existing law, the State Water Resources Control Board and the California regional water quality control boards prescribe waste discharge requirements in accordance with the federal Clean Water Act and the Porter-Cologne Water Quality Control Act (state act). The state act, with certain exceptions, imposes a mandatory minimum penalty of \$3,000 for each serious waste discharge violation, as defined, and for certain other described violations if those violations occur 4 or more times in any period of 6 consecutive months.

The state act authorizes the state board or a regional board, in lieu of assessing all or a portion of the mandatory minimum penalties against a publicly owned treatment works (POTW) that serves a small community, to elect to require that POTW to spend an equivalent amount toward the completion of a compliance project. The state act defines a POTW that serves a small community to mean, in pertinent part, a POTW serving a community of 10,000 persons or fewer.

This bill would expand that definition to include a POTW serving a community of 20,000 persons or fewer. The bill also would authorize the state board or a regional board to waive specified *nonpayment* penalties for late payment and nonpayment of civil liabilities and civil penalties for a POTW that is subject to the compliance project provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 13385 of the Water Code is amended to
2 read:
3 13385. (a) A person who violates any of the following is liable
4 civilly in accordance with this section:
5 (1) Section 13375 or 13376.
6 (2) A waste discharge requirement or dredged or fill material
7 permit issued pursuant to this chapter or any water quality
8 certification issued pursuant to Section 13160.
9 (3) A requirement established pursuant to Section 13383.
10 (4) An order or prohibition issued pursuant to Section 13243 or
11 Article 1 (commencing with Section 13300) of Chapter 5, if the
12 activity subject to the order or prohibition is subject to regulation
13 under this chapter.
14 (5) A requirement of Section 301, 302, 306, 307, 308, 318, 401,
15 or 405 of the federal Clean Water Act (33 U.S.C. Sec. 1311, 1312,
16 1316, 1317, 1318, ~~1341, or 1342~~ 1328, 1341, or 1345), as amended.
17 (6) A requirement imposed in a pretreatment program approved
18 pursuant to waste discharge requirements issued under Section
19 13377 or approved pursuant to a permit issued by the administrator.
20 (b) (1) Civil liability may be imposed by the superior court in
21 an amount not to exceed the sum of both of the following:
22 (A) Twenty-five thousand dollars (\$25,000) for each day in
23 which the violation occurs.
24 (B) If there is a discharge, any portion of which is not
25 susceptible to cleanup or is not cleaned up, and the volume
26 discharged but not cleaned up exceeds 1,000 gallons, an additional
27 liability not to exceed twenty-five dollars (\$25) multiplied by the
28 number of gallons by which the volume discharged but not cleaned
29 up exceeds 1,000 gallons.

1 (2) The Attorney General, upon request of a regional board or
2 the state board, shall petition the superior court to impose the
3 liability.

4 (c) Civil liability may be imposed administratively by the state
5 board or a regional board pursuant to Article 2.5 (commencing
6 with Section 13323) of Chapter 5 in an amount not to exceed the
7 sum of both of the following:

8 (1) Ten thousand dollars (\$10,000) for each day in which the
9 violation occurs.

10 (2) If there is a discharge, any portion of which is not susceptible
11 to cleanup or is not cleaned up, and the volume discharged but not
12 cleaned up exceeds 1,000 gallons, an additional liability not to
13 exceed ten dollars (\$10) multiplied by the number of gallons by
14 which the volume discharged but not cleaned up exceeds 1,000
15 gallons.

16 (d) For purposes of subdivisions (b) and (c), “discharge”
17 includes any discharge to navigable waters of the United States,
18 any introduction of pollutants into a publicly owned treatment
19 works, or any use or disposal of sewage sludge.

20 (e) In determining the amount of any liability imposed under
21 this section, the regional board, the state board, or the superior
22 court, as the case may be, shall take into account the nature,
23 circumstances, extent, and gravity of the violation or violations,
24 whether the discharge is susceptible to cleanup or abatement, the
25 degree of toxicity of the discharge, and, with respect to the violator,
26 the ability to pay, the effect on its ability to continue its business,
27 any voluntary cleanup efforts undertaken, any prior history of
28 violations, the degree of culpability, economic benefit or savings,
29 if any, resulting from the violation, and other matters that justice
30 may require. At a minimum, liability shall be assessed at a level
31 that recovers the economic benefits, if any, derived from the acts
32 that constitute the violation.

33 (f) (1) Except as provided in paragraph (2), for the purposes of
34 this section, a single operational upset that leads to simultaneous
35 violations of more than one pollutant parameter shall be treated
36 as a single violation.

37 (2) (A) For the purposes of subdivisions (h) and (i), a single
38 operational upset in a wastewater treatment unit that treats
39 wastewater using a biological treatment process shall be treated
40 as a single violation, even if the operational upset results in

1 violations of more than one effluent limitation and the violations
2 continue for a period of more than one day, if all of the following
3 apply:

4 (i) The discharger demonstrates all of the following:

5 (I) The upset was not caused by wastewater treatment operator
6 error and was not due to discharger negligence.

7 (II) But for the operational upset of the biological treatment
8 process, the violations would not have occurred nor would they
9 have continued for more than one day.

10 (III) The discharger carried out all reasonable and immediately
11 feasible actions to reduce noncompliance with the applicable
12 effluent limitations.

13 (ii) The discharger is implementing an approved pretreatment
14 program, if so required by federal or state law.

15 (B) Subparagraph (A) only applies to violations that occur
16 during a period for which the regional board has determined that
17 violations are unavoidable, but in no case may that period exceed
18 30 days.

19 (g) Remedies under this section are in addition to, and do not
20 supersede or limit, any other remedies, civil or criminal, except
21 that no liability shall be recoverable under Section 13261, 13265,
22 13268, or 13350 for violations for which liability is recovered
23 under this section.

24 (h) (1) Notwithstanding any other provision of this division,
25 and except as provided in subdivisions (j), (k), and (l), a mandatory
26 minimum penalty of three thousand dollars (\$3,000) shall be
27 assessed for each serious violation.

28 (2) For the purposes of this section, a “serious violation” means
29 any waste discharge that violates the effluent limitations contained
30 in the applicable waste discharge requirements for a Group II
31 pollutant, as specified in Appendix A to Section 123.45 of Title
32 40 of the Code of Federal Regulations, by 20 percent or more or
33 for a Group I pollutant, as specified in Appendix A to Section
34 123.45 of Title 40 of the Code of Federal Regulations, by 40
35 percent or more.

36 (i) (1) Notwithstanding any other provision of this division,
37 and except as provided in subdivisions (j), (k), and (l), a mandatory
38 minimum penalty of three thousand dollars (\$3,000) shall be
39 assessed for each violation if the person does any of the following
40 four or more times in any period of six consecutive months, except

1 that the requirement to assess the mandatory minimum penalty
2 shall not be applicable to the first three violations:

3 (A) Violates a waste discharge requirement effluent limitation.

4 (B) Fails to file a report pursuant to Section 13260.

5 (C) Files an incomplete report pursuant to Section 13260.

6 (D) Violates a toxicity effluent limitation contained in the
7 applicable waste discharge requirements where the waste discharge
8 requirements do not contain pollutant-specific effluent limitations
9 for toxic pollutants.

10 (2) For the purposes of this section, a “period of six consecutive
11 months” means the period commencing on the date that one of the
12 violations described in this subdivision occurs and ending 180
13 days after that date.

14 (j) Subdivisions (h) and (i) do not apply to any of the following:

15 (1) A violation caused by one or any combination of the
16 following:

17 (A) An act of war.

18 (B) An unanticipated, grave natural disaster or other natural
19 phenomenon of an exceptional, inevitable, and irresistible
20 character, the effects of which could not have been prevented or
21 avoided by the exercise of due care or foresight.

22 (C) An intentional act of a third party, the effects of which could
23 not have been prevented or avoided by the exercise of due care or
24 foresight.

25 (D) (i) The operation of a new or reconstructed wastewater
26 treatment unit during a defined period of adjusting or testing, not
27 to exceed 90 days for a wastewater treatment unit that relies on a
28 biological treatment process and not to exceed 30 days for any
29 other wastewater treatment unit, if all of the following requirements
30 are met:

31 (I) The discharger has submitted to the regional board, at least
32 30 days in advance of the operation, an operations plan that
33 describes the actions the discharger will take during the period of
34 adjusting and testing, including steps to prevent violations and
35 identifies the shortest reasonable time required for the period of
36 adjusting and testing, not to exceed 90 days for a wastewater
37 treatment unit that relies on a biological treatment process and not
38 to exceed 30 days for any other wastewater treatment unit.

39 (II) The regional board has not objected in writing to the
40 operations plan.

1 (III) The discharger demonstrates that the violations resulted
2 from the operation of the new or reconstructed wastewater
3 treatment unit and that the violations could not have reasonably
4 been avoided.

5 (IV) The discharger demonstrates compliance with the
6 operations plan.

7 (V) In the case of a reconstructed wastewater treatment unit,
8 the unit relies on a biological treatment process that is required to
9 be out of operation for at least 14 days in order to perform the
10 reconstruction, or the unit is required to be out of operation for at
11 least 14 days and, at the time of the reconstruction, the cost of
12 reconstructing the unit exceeds 50 percent of the cost of replacing
13 the wastewater treatment unit.

14 (ii) For the purposes of this section, “wastewater treatment unit”
15 means a component of a wastewater treatment plant that performs
16 a designated treatment function.

17 (2) (A) Except as provided in subparagraph (B), a violation of
18 an effluent limitation where the waste discharge is in compliance
19 with either a cease and desist order issued pursuant to Section
20 13301 or a time schedule order issued pursuant to Section 13300,
21 if all of the following requirements are met:

22 (i) The cease and desist order or time schedule order is issued
23 after January 1, 1995, but not later than July 1, 2000, specifies the
24 actions that the discharger is required to take in order to correct
25 the violations that would otherwise be subject to subdivisions (h)
26 and (i), and the date by which compliance is required to be achieved
27 and, if the final date by which compliance is required to be
28 achieved is later than one year from the effective date of the cease
29 and desist order or time schedule order, specifies the interim
30 requirements by which progress ~~towards~~ *toward* compliance will
31 be measured and the date by which the discharger will be in
32 compliance with each interim requirement.

33 (ii) The discharger has prepared and is implementing in a timely
34 and proper manner, or is required by the regional board to prepare
35 and implement, a pollution prevention plan that meets the
36 requirements of Section 13263.3.

37 (iii) The discharger demonstrates that it has carried out all
38 reasonable and immediately feasible actions to reduce
39 noncompliance with the waste discharge requirements applicable

1 to the waste discharge and the executive officer of the regional
2 board concurs with the demonstration.

3 (B) Subdivisions (h) and (i) shall become applicable to a waste
4 discharge on the date the waste discharge requirements applicable
5 to the waste discharge are revised and reissued pursuant to Section
6 13380, unless the regional board does all of the following on or
7 before that date:

8 (i) Modifies the requirements of the cease and desist order or
9 time schedule order as may be necessary to make it fully consistent
10 with the reissued waste discharge requirements.

11 (ii) Establishes in the modified cease and desist order or time
12 schedule order a date by which full compliance with the reissued
13 waste discharge requirements shall be achieved. For the purposes
14 of this subdivision, the regional board may not establish this date
15 later than five years from the date the waste discharge requirements
16 were required to be reviewed pursuant to Section 13380. If the
17 reissued waste discharge requirements do not add new effluent
18 limitations or do not include effluent limitations that are more
19 stringent than those in the original waste discharge requirements,
20 the date shall be the same as the final date for compliance in the
21 original cease and desist order or time schedule order or five years
22 from the date that the waste discharge requirements were required
23 to be reviewed pursuant to Section 13380, whichever is earlier.

24 (iii) Determines that the pollution prevention plan required by
25 clause (ii) of subparagraph (A) is in compliance with the
26 requirements of Section 13263.3 and that the discharger is
27 implementing the pollution prevention plan in a timely and proper
28 manner.

29 (3) A violation of an effluent limitation where the waste
30 discharge is in compliance with either a cease and desist order
31 issued pursuant to Section 13301 or a time schedule order issued
32 pursuant to Section 13300 or 13308, if all of the following
33 requirements are met:

34 (A) The cease and desist order or time schedule order is issued
35 on or after July 1, 2000, and specifies the actions that the discharger
36 is required to take in order to correct the violations that would
37 otherwise be subject to subdivisions (h) and (i).

38 (B) The regional board finds that, for one of the following
39 reasons, the discharger is not able to consistently comply with one

1 or more of the effluent limitations established in the waste
2 discharge requirements applicable to the waste discharge:

3 (i) The effluent limitation is a new, more stringent, or modified
4 regulatory requirement that has become applicable to the waste
5 discharge after the effective date of the waste discharge
6 requirements and after July 1, 2000, new or modified control
7 measures are necessary in order to comply with the effluent
8 limitation, and the new or modified control measures cannot be
9 designed, installed, and put into operation within 30 calendar days.

10 (ii) New methods for detecting or measuring a pollutant in the
11 waste discharge demonstrate that new or modified control measures
12 are necessary in order to comply with the effluent limitation and
13 the new or modified control measures cannot be designed, installed,
14 and put into operation within 30 calendar days.

15 (iii) Unanticipated changes in the quality of the municipal or
16 industrial water supply available to the discharger are the cause
17 of unavoidable changes in the composition of the waste discharge,
18 the changes in the composition of the waste discharge are the cause
19 of the inability to comply with the effluent limitation, no alternative
20 water supply is reasonably available to the discharger, and new or
21 modified measures to control the composition of the waste
22 discharge cannot be designed, installed, and put into operation
23 within 30 calendar days.

24 (iv) The discharger is a publicly owned treatment works located
25 in Orange County that is unable to meet effluent limitations for
26 biological oxygen demand, suspended solids, or both, because the
27 publicly owned treatment works meets all of the following criteria:

28 (I) Was previously operating under modified secondary
29 treatment requirements pursuant to Section 301(h) of the federal
30 Clean Water Act (33 U.S.C. Sec. 1311(h)).

31 (II) Did vote on July 17, 2002, not to apply for a renewal of the
32 modified secondary treatment requirements.

33 (III) Is in the process of upgrading its treatment facilities to
34 meet the secondary treatment standards required by Section
35 301(b)(1)(B) of the federal Clean Water Act (33 U.S.C. Sec.
36 1311(b)(1)(B)).

37 (C) (i) The regional board establishes a time schedule for
38 bringing the waste discharge into compliance with the effluent
39 limitation that is as short as possible, taking into account the
40 technological, operational, and economic factors that affect the

1 design, development, and implementation of the control measures
2 that are necessary to comply with the effluent limitation. Except
3 as provided in clause (ii), for the purposes of this subdivision, the
4 time schedule shall not exceed five years in length.

5 (ii) (I) For purposes of the upgrade described in subclause (III)
6 of clause (iv) of subparagraph (B), the time schedule shall not
7 exceed 10 years in length.

8 (II) Following a public hearing, and upon a showing that the
9 discharger is making diligent progress toward bringing the waste
10 discharge into compliance with the effluent limitation, the regional
11 board may extend the time schedule for an additional period not
12 exceeding five years in length, if the discharger demonstrates that
13 the additional time is necessary to comply with the effluent
14 limitation. This subclause does not apply to a time schedule
15 described in subclause (I).

16 (iii) If the time schedule exceeds one year from the effective
17 date of the order, the schedule shall include interim requirements
18 and the dates for their achievement. The interim requirements shall
19 include both of the following:

20 (I) Effluent limitations for the pollutant or pollutants of concern.

21 (II) Actions and milestones leading to compliance with the
22 effluent limitation.

23 (D) The discharger has prepared and is implementing in a timely
24 and proper manner, or is required by the regional board to prepare
25 and implement, a pollution prevention plan pursuant to Section
26 13263.3.

27 (k) (1) In lieu of assessing all or a portion of the mandatory
28 minimum penalties pursuant to subdivisions (h) and (i) against a
29 publicly owned treatment works serving a small community, the
30 state board or the regional board may elect to require the publicly
31 owned treatment works to spend an equivalent amount toward the
32 completion of a compliance project proposed by the publicly owned
33 treatment works, if the state board or the regional board finds all
34 of the following:

35 (A) The compliance project designed to correct the violations
36 within five years.

37 (B) The compliance project is in accordance with the
38 enforcement policy of the state board, excluding any provision in
39 the policy that is inconsistent with this section.

1 (C) The publicly owned treatment works has prepared a
2 financing plan to complete the compliance project.

3 (2) For the purposes of this subdivision, “a publicly owned
4 treatment works serving a small community” means a publicly
5 owned treatment works serving a population of 20,000 persons or
6 fewer or a rural county, with a financial hardship as determined
7 by the state board after considering such factors as median income
8 of the residents, rate of unemployment, or low population density
9 in the service area of the publicly owned treatment works.

10 (I) (1) In lieu of assessing penalties pursuant to subdivision (h)
11 or (i), the state board or the regional board, with the concurrence
12 of the discharger, may direct a portion of the penalty amount to
13 be expended on a supplemental environmental project in
14 accordance with the enforcement policy of the state board. If the
15 penalty amount exceeds fifteen thousand dollars (\$15,000), the
16 portion of the penalty amount that may be directed to be expended
17 on a supplemental environmental project may not exceed fifteen
18 thousand dollars (\$15,000) plus 50 percent of the penalty amount
19 that exceeds fifteen thousand dollars (\$15,000).

20 (2) For the purposes of this section, a “supplemental
21 environmental project” means an environmentally beneficial project
22 that a person agrees to undertake, with the approval of the regional
23 board, that would not be undertaken in the absence of an
24 enforcement action under this section.

25 (3) This subdivision applies to the imposition of penalties
26 pursuant to subdivision (h) or (i) on or after January 1, 2003,
27 without regard to the date on which the violation occurs.

28 (m) (1) The Attorney General, upon request of a regional board
29 or the state board, shall petition the appropriate court to collect
30 any liability or penalty imposed pursuant to this section. Except
31 as provided in paragraph (2), a person who fails to pay on a timely
32 basis any liability or penalty imposed under this section shall be
33 required to pay, in addition to that liability or penalty, interest,
34 attorney’s fees, costs for collection proceedings, and a quarterly
35 nonpayment penalty for each quarter during which the failure to
36 pay persists. The nonpayment penalty shall be in an amount equal
37 to 20 percent of the aggregate amount of the person’s penalty and
38 nonpayment penalties that are unpaid as of the beginning of the
39 quarter.

1 (2) A regional board or the state board may elect to waive the
2 ~~penalties for late payment and nonpayment~~ *nonpayment penalties*
3 pursuant to paragraph (1) for a publicly owned treatment works
4 that is subject to subdivision (k).

5 (n) (1) Subject to paragraph (2), funds collected pursuant to
6 this section shall be deposited in the State Water Pollution Cleanup
7 and Abatement Account.

8 (2) (A) Notwithstanding any other provision of law, moneys
9 collected for a violation of a water quality certification in
10 accordance with paragraph (2) of subdivision (a) or for a violation
11 of Section 401 of the federal Clean Water Act (33 U.S.C. Sec.
12 1341) in accordance with paragraph (5) of subdivision (a) shall be
13 deposited in the Waste Discharge Permit Fund and separately
14 accounted for in that fund.

15 (B) The funds described in subparagraph (A) shall be expended
16 by the state board, upon appropriation by the Legislature, to assist
17 regional boards, and other public agencies with authority to clean
18 up waste or abate the effects of the waste, in cleaning up or abating
19 the effects of the waste on waters of the state or for the purposes
20 authorized in Section 13443.

21 (o) The state board shall continuously report and update
22 information on its Internet Web site, but at a minimum, annually
23 on or before January 1, regarding its enforcement activities. The
24 information shall include all of the following:

25 (1) A compilation of the number of violations of waste discharge
26 requirements in the previous calendar year, including stormwater
27 enforcement violations.

28 (2) A record of the formal and informal compliance and
29 enforcement actions taken for each violation, including stormwater
30 enforcement actions.

31 (3) An analysis of the effectiveness of current enforcement
32 policies, including mandatory minimum penalties.

33 (p) The amendments made to subdivisions (f), (h), (i), and (j)
34 during the second year of the 2001–02 Regular Session apply only
35 to violations that occur on or after January 1, 2003.